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No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF TEXAS, CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that the court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review.

2. Whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates *Teague v. Lane*, 489 U.S. 288 (1989).

3. Whether the Ninth Circuit erred in holding that 28 U.S.C. §2254(d)(1) and (2) adopted the *Teague* exceptions for watershed rules and for private conduct that is beyond criminal proscription.

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INTEREST OF *AMICI CURIAE*

The *amici* States, through their Attorneys General, respectfully submit this brief in support of Petitioner. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Court held that the Sixth Amendment's Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." This case presents the question whether the *Crawford* rule should be applied retroactively in federal habeas review. The States have a substantial stake in this question because the finality of innumerable state criminal judgments turns on the outcome.

The Court has long recognized the States' interest in the finality of criminal convictions. *See Beard v. Banks*, 542 U.S. 406, 413 (2004). The presumption that new rules of criminal procedure do not apply retroactively furthers this interest by limiting the power of federal courts to issue habeas relief. *See id.*, at 412-13. Otherwise, "the application of new rules to cases on collateral review . . . [would] continually force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989).

The present controversy fully implicates these concerns for finality and the preservation of state resources. A decision that *Crawford* applies retroactively would have an immediate and far-reaching effect on the States' criminal justice systems. Such a holding would potentially expose to collateral attack any conviction involving a Confrontation Clause issue that was resolved under prior law. The number of cases in this category is undoubtedly immense. Relitigating these long-final criminal convictions through federal habeas proceedings would stretch the States' already limited resources and force a serious realignment of prosecutorial priorities. For these reasons, 38 states urge the Court to reverse the judgment of the Ninth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

***Crawford* Established a New Rule of Federal Law.** *Crawford* imposed a new analytical question in Confrontation Clause jurisprudence. A court must now determine whether evidence is "testimonial" in order to determine whether it can be introduced in a criminal prosecution without live testimony. As a result, all of the courts to address this issue – including two of the judges on the panel opinion in this case – have determined that *Crawford* is a new rule under *Teague* that presumptively does not apply retroactively to final convictions under federal habeas review.

Under *Teague*, *Crawford* does not apply retroactively because it is not a "watershed rule": *Crawford* changed the analysis by which a court determines whether evidence can be introduced at trial. But that change does not constitute a "watershed rule" excepted from *Teague*'s nonretroactivity principle. A watershed rule is one that creates an entirely new principle of criminal due process, on the level of magnitude of the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 355 (1963). *Crawford*'s incremental change in the test for determining whether evidence can be introduced without the testimony of a live witness does not meet that high standard.

Retroactive application of *Crawford* would frustrate the States' interest in administering the criminal justice system in a fair and efficient manner. The *Crawford* test has created a significant amount of appellate litigation attempting to delineate the scope of the testimonial-evidence requirement. The potential number of collateral habeas claims is, accordingly, enormous. Relitigation of these convictions would place a major strain on the resources of the state and federal courts. That strain would be completely out of a proportion to the change effected by *Crawford*. And it provides a compelling reason why the Court should hold that *Crawford* does not apply retroactively in federal habeas cases.

Under §2254(d)(1) of the AEDPA, the new rule announced in *Crawford* cannot apply retroactively. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court cannot grant a writ of habeas corpus unless the state court's merits decision was contrary to or an unreasonable application of clearly established Supreme Court precedent as of the time the state court denied relief. 28 U.S.C. §2254(d)(1). And, contrary to what the court of appeals held, Section 2254(d)(1) does not incorporate the *Teague* exceptions. A plain reading of the statute establishes the absence of these exceptions: the "clearly established" requirement in that section is unqualified. And a comparison of the text of §2254(d)(1) with the language of other AEDPA provisions provides strong evidence that Congress did not intend to incorporate the *Teague* exceptions into §2254(d)(1).

Here, Bockting relies on *Crawford* as the basis for his Sixth Amendment claim. But *Crawford* was not clearly established precedent in 1993 when the Nevada Supreme Court denied relief. And because the *Teague* exceptions are not incorporated into §2254(d)(1), Bockting cannot circumvent the statute's "clearly established" requirement by seeking to prove that *Crawford* constitutes a watershed rule of criminal procedure.

ARGUMENT

I. UNDER *TEAGUE*, *CRAWFORD* ANNOUNCED A NEW RULE THAT DOES NOT APPLY RETROACTIVELY.

The *Teague* principle of nonretroactivity "prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Application of this principle involves three steps. First, "the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Id.*, at 390. Next, "the court must survey the legal landscape as it then existed, and determine whether a state

court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." *Id.* (citations and quotations omitted). Stated differently, the Court must assess whether the defendant "seeks the benefit of a new rule." *See id.* "Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle." *Id.*

It is undisputed that Bockting's conviction and sentence were final at the time *Crawford* was decided. Thus, this case involves only the second and third inquiries in the *Teague* analysis: whether *Crawford* announced a new rule and, if so, whether *Crawford* nevertheless falls within one of *Teague*'s exceptions that would permit a federal court to apply *Crawford* retroactively to Bockting's habeas proceeding. The answer to these questions is plain: by its terms, *Crawford* announced a new rule, and it does not come within either of *Teague*'s exceptions.

A. *Crawford*'s Change in Sixth Amendment Analysis Created a "New Rule."

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S., at 301 (citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)). Put another way, a rule is new when its result was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (citing *Truesdale v. Aiken*, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting)); *see also Saffle v. Parks*, 494 U.S. 484, 488 (1990).

For a quarter-century prior to *Crawford*, federal courts determined the admissibility of hearsay evidence in a criminal

proceeding under the "reliability" standard announced in *Ohio v. Roberts*, 444 U.S. 56 (1980):

> "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*, at 66 (footnote omitted).

In *Crawford*, the Court abandoned the *Roberts* standard for hearsay evidence classified as "testimonial." For such evidence, the Court held that the Sixth Amendment requires a showing of both unavailability *and* a prior opportunity for cross-examination before the evidence will be admitted. *Crawford*, 541 U.S., at 68. *Crawford* did not fully define what evidence qualifies as "testimonial," explaining that "[w]hatever else the term ['testimonial'] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*[1] But the Court left no doubt that its decision was a departure

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1. Subsequently, in two consolidated cases on direct review, the Court adopted a case-specific standard for determining whether a particular statement, in a particular situation, should be considered "testimonial" for *Crawford* purposes. *Davis v. Washington*, 126 S.Ct. 2266 (2006). The Court's narrowly drawn opinion held that statements made in a police investigation are non-testimonial when the purpose of seeking police assistance is to deal with an ongoing emergency, but are testimonial when there is no such emergency and the interrogation is intended to establish or prove past events. *Id.*, at 2273-74. *Davis* did not elucidate a broader principle for recognizing testimonial statements.

from prior law: *Crawford* expressly overruled *Roberts* to the extent it applied to "testimonial" evidence. 541 U.S., at 60-61; *see also id.*, at 69, Rehnquist, C.J., concurring) ("I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent.").

It is difficult to conceive a truer hallmark of a new rule than the express overruling of precedent. Indeed, when a rule is born from these circumstances, it by definition qualifies as a "new rule" for *Teague* purposes. *See Saffle*, 494 U.S. at 488.[2] For this reason alone, *Crawford* satisfies the second step in the *Teague* analysis.

Moreover, *Crawford* represents a clear break from *Roberts* because, for testimonial evidence, it redirects the focus of the Confrontation Clause analysis from indicia of reliability to "the principal evil at which the Confrontation Clause was directed[:] the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S., at 50. This analytical distinction further cements *Crawford*'s status as a new rule.

Finally, the near unanimity of lower courts on this issue corroborates the States' position. Every federal circuit to reach the question has concluded that *Crawford* announced a new rule under *Teague*,[3] and even those that have not addressed it have consistently

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2. Indeed, the concurring justices explicitly characterized the rule as "new." *Crawford*, 541 U.S., at 75 (Rehnquist, C.J., and O'Connor, J., concurring in the judgment).

3. The Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have held that *Crawford* announces a new rule and that it does not apply retroactively. *Lave v. Dretke*, 444 F.3d 333, 335 (CA5 2006), *petition for cert. filed*, June 13, 2006 (No. 05-11552); *Dorchy v. Jones*, 398 F.3d 783, 788 (CA6 2005); *Bintz v. Bertrand*, 403 F.3d 859, 866 (CA7), *cert. denied*, 126 S.

declined to apply *Crawford* retroactively.[4] State courts considering the question have reached the same result.[5] In stark contrast to this broad consensus, Judge Noonan's concurrence in this case appears to be the only judicial opinion to treat *Crawford* as though it did not create a new rule. *Bockting v. Bayer*, 399 F.3d 1010, 1023 (9th Cir. 2005) ("*Bockting I*") (Noonan, J., concurring), *as amended*, 408 F.3d 127, *and rehearing denied*, 418 F.3d 1055.

Ct. 174 (2005); *Murillo v. Frank*, 402 F.3d 786, 790 (CA7 2005); *Brown v. Uphoff*, 381 F.3d 1219, 1226 (CA10 2004), *cert. denied sub nom. Brown v. Lampert*, 543 U.S. 1079 (2005); *Espy v. Massac*, 443 F.3d 1362, 1366-67 (CA11 2006).

4. The Second Circuit assumed without deciding that *Crawford* announced a new rule. *See Mungo v. Duncan*, 393 F.3d 327, 335 (CA2 2004), *cert. denied sub nom. Mungo v. Greene*, 544 U.S. 1002 (2005). The Eighth and First Circuits likewise assumed that *Crawford* did not merit retroactive application. *Evans v. Luebbers*, 371 F.3d 438, 444-45 (CA8 2004) (noting that the rule did not appear to fit within either of *Teague*'s exceptions), *cert. denied sub nom. Evans v. Roper*, 543 U.S. 1067 (2005); *McGonagle v. United States*, 137 Fed. Appx. 373, 380 (CA1 2005) (unpublished opinion) ("It is doubtful that *Crawford* applies retroactively to cases on collateral review.").

5. *See, e.g., In re Markel*, 111 P.3d 249, 270 (Wash. 2005) (*en banc*) ("[W]hile the reasoning in *Crawford* relied upon the historical underpinnings of the [C]onfrontation [C]lause, the rule itself is a departure from previous United States Supreme Court precedent."); *Edwards v. People*, 129 P.3d 977, 984-86 (Colo. 2006) (*en banc*) (same); *see also Drach v. Bruce*, No. 93,654, 2006 WL 1562105 (Kan. June 9, 2006); *Chandler v. Crosby*, 916 So.2d. 728, 729-31 (Fla. 2005).

B. The *Teague* Exception for "Watershed Rules" Does Not Apply to *Crawford*.

The two "narrow" exceptions to the *Teague* non-retroactivity principle are (1) rules forbidding punishment "of certain primary conduct . . . prohibiting a certain category of punishment for a class of defendants because of their status or offense," or (2) "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). This case does not implicate the first exception because *Crawford* regulates "only the manner of determining the defendant's culpability." *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Crawford also does not satisfy the second exception because it is not a "watershed rule." Such rules "require[] the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 U.S., at 311. For this exception to apply, "the procedure at issue must implicate the fundamental fairness of the trial" or its absence must "seriously diminish the likelihood of obtaining an accurate conviction." *Id.*, at 312, 315. That is, a "watershed rule" must do more than "preserve the accuracy" of criminal convictions; it must also recognize the emergence of "a component of basic due process." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citing *Solem v. Stumes*, 465 U.S. 638, 654 (1984)). It is thus insufficient that the "new procedural rule is 'fundamental' in some abstract sense[.]" *Summerlin*, 542 U.S., at 352 (citation omitted). Measured against this high standard *Crawford* is not a watershed rule.

1. *Crawford* does not implicate a trial's fundamental fairness.

To assess whether a new rule implicates a trial's "fundamental fairness," the Court may compare it to the paradigmatic watershed rule, *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494

U.S. at 495 (the rule in *Gideon* is "usually cited . . . to illustrate the type of rule coming within the exception."). In *Gideon*, the Court announced, for the first time, that the Sixth Amendment's guarantee of counsel "in all criminal prosecutions" was a fundamental and essential part of due process and that the States were bound by this command through the Fourteenth Amendment. 372 U.S., at 342-45. This bright-line, fundamental rule – that all defendants were entitled to counsel – definitively altered the courts' understanding of what constitutes basic due process.

In sharp contrast to *Gideon*, *Crawford* "did not confer a substantive constitutional right that had not existed before." *Solem*, 465 U.S. 648, at 644 n.4 (1984) (internal quotation marks and citations omitted). Rather, it simply changed the standard for determining whether evidence is sufficiently reliable that it can be introduced at trial without live testimony while satisfying the Confrontation Clause. Stated differently, *Crawford* "created a protective umbrella serving to enhance a constitutional guarantee." *Id.* To be sure, the right established by the Confrontation Clause is a "bedrock procedural guarantee." *Crawford*, 541 U.S., at 42. But not every rule effectuating such rights necessarily acquires that fundamental character.[6] *See Johnson v. McKune*, 288 F.3d 1187,

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6. The Court has twice before given retroactive effect to rules effectuating the guarantee of the right of confrontation. Both are easily distinguishable. First, in *Roberts v. Russell*, 392 U.S. 293 (1968) (per curiam), the Court's decision to apply its holding retroactively derived from its earlier analysis in *Linkletter v. Walker*, 318 U.S. 618 (1965). *Teague* expressly rejected *Linkletter*. 489 U.S., at 302 ("The *Linkletter* retroactivity standard has not led to consistent results."), 303 ("Application of the *Linkletter* standard has led to disparate treatment of similarly situated defendants on direct review."). Thus, *Roberts*' precedential value after *Teague* is in doubt. Second, *Berger v. California* came to the Court on direct appeal. 393 U.S. 314 (1969) (per curiam), and there is no such bar on the retroactive application of new

1199 (CA10 2002) ("Not every holding that draws on a wellspring rule is itself a wellspring holding.").

Moreover, unlike *Gideon*, *Crawford* did not announce a categorical rule, but refined a case-specific standard – as the Court's recent decision in *Davis* illustrates. Determining whether evidence is "testimonial," and thus subject to *Crawford*'s heightened admissibility requirements, will typically require a case-by-case inquiry turning on the factual circumstances in which the evidence was developed. *See Davis*, 126 S. Ct., at 2270, 2273-74; *see also id.*, at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing that this test is as unpredictable as the *Roberts* test that was criticized in *Crawford*). Such a fact-intensive rule defies characterization as "fundamental."

2. The *Crawford* rule's absence did not seriously diminish the likelihood of obtaining accurate convictions.

Similarly, the absence of the *Crawford* rule in earlier cases did not "seriously diminish the likelihood of obtaining an accurate conviction." *Teague*, 489 U.S., at 312. Although in *Crawford* the Court criticized the displaced *Roberts* test as "unpredictable," *id.*, at 68 n.10, that assessment does not necessarily undermine the accuracy of convictions involving testimonial evidence admitted under that test. Under *Roberts*, only statements adjudged reliable were admissible. That *Crawford* may have raised the bar for admissibility does not demonstrate that the *Roberts* test created an impermissible risk of false conviction. *See Lave*, 444 F.3d, at 336. As Judge Easterbrook explained in *Murillo*:

> "[I]t would be a close question whether *Crawford* helps or hinders accurate decisionmaking. Live testimony is

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rules for cases on direct appeal.

> preferable to affidavits and transcribed confessions, but recorded testimony may be better than silence, when death or incapacity or threats or loyalty to one's confederates keep witnesses off the stand. The point of *Crawford* is not that only live testimony is reliable, but that the [S]ixth [A]mendment gives the accused the right to insist on live testimony, whether that demand promotes or frustrates accuracy. Like the [S]elf-incrimination [C]lause and other provisions in the Bill of Rights, the [C]onfrontation [C]lause can be invoked to prevent the conviction of persons who are guilty in fact. What *Crawford* holds is that defendants enjoy this right even when the hearsay is trustworthy." 402 F.3d at 790-91.[7]

Although cross-examination is now the constitutionally recognized tool for determining the reliability of testimony in criminal trials. *Crawford*, 541 U.S., at 67, the *Roberts* test was likewise a test for determining the reliability of testimony. *Id.*, at 61. The difference between the two methodologies is largely whether the judge determines reliability by application of a multi-factored test or whether the jury determines reliability through the process of adversarial testing. As the Court and other courts have already recognized, a shift from judge to jury as factfinder does not substantially increase the accuracy of the ultimate factual determination. *See Summerlin*, 542 U.S., at 356 ("When so many

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7. *See also Bintz*, 403 F.3d at 867 (observing that the rule of *Crawford* is "not a guarantee of accuracy, but an extension of the full constitutional protections of the Sixth Amendment."); *Mungo*, 393 F.3d at 336 (reasoning that while *Crawford* will improve a trial's accuracy by barring the admission of some unreliable evidence, it will, by the same token, "deprive[] [juries] of highly reliable evidence of guilt [that would have been admissible under the old rules], and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries.").

presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy."); *see also United States v. Sanders*, 247 F.3d 139, 149 (CA4 2001) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should not be applied retroactively because "a new rule mandating a jury to decide an issue rather than a judge cannot fall within the scope of the second *Teague* exception");[8] *Bilzerian v. United States*, 127 F.3d 237, 241 (CA2 1997) ("The rule in [*United States v.*] *Gaudin* [515 U.S. 506 (1995)] merely shifts the determination of materiality from the judge to the jury. This shifting does not 'alter our understanding of the bedrock procedural elements' essential to the fairness of a trial." (citation omitted)). For this additional reason, *Crawford* is not within the *Teague* exception for "watershed rules."

3. An issue that goes only to trial error – and is therefore subject to harmless-error analysis – cannot mark a watershed rule.

Finally, the fact that *Crawford* is subject to harmless-error analysis undermines the proposition that it could be a "watershed rule." A harm that can be cured by the introduction of evidence at another point in the same trial cannot be so fundamental that it changes the bedrock principles of criminal due process.[9]

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8. *See also Blakely v. Washington*, 542 U.S. 296, 323 (2004) (O'Connor, J., concurring) ("[W]e [held] in [*Summerlin*] that *Ring* (and *a fortiori Apprendi*) does not apply retroactively to cases on habeas review[.]").

9. *See Brown*, 381 F.3d, at 1226-27 (finding that *Crawford* cannot be a "watershed rule" because "Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial."); *see also Edwards*, 129 P.3d, at 988.

And *Crawford* is subject to harmless-error analysis. In *Delaware v. Van Arsdall*, the Court reiterated that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one" 475 U.S. 673, 681 (1986). Most errors in criminal proceedings – such as the erroneous admission of evidence – "occur during the presentation of the case to the jury" and "may be qualitatively assessed in the context of other evidence to determine" the effect on the trial. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). Violations of the Confrontation Clause fall within this category. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (finding admission of non-testifying accomplice's confession, containing both statements against the accomplice's penal interest and statements inculpating the defendant subject to harm analysis); *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988) (noting that "denial of face to face to confrontation" in violation of the Confrontation Clause subject to harm analysis); *Lee v. Illinois*, 476 U.S. 530, 547 (1986) (admission of statement may still be "harmless when assessed in the context of the entire case against [the defendant].").[10]

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10. The State in *Crawford* did not challenge the lower court's holding that the violation in that case was *not* harmless, and the Court "express[ed] no opinion" on the matter. 541 U.S., at 42 n.1. Nevertheless, state courts applying *Crawford* on direct appeal have done so using a harm analysis. *See, e.g., People v. Cage*, 15 Cal.Rptr.3d 846, 857-58 (Cal. Ct. App. 2004) (partial publication); *People v. Pirwani*, 14 Cal.Rptr.3d 673, 688 (Cal. Ct. App. 2004); *People v. Vigil*, 127 P.3d 916, 929-30 (Colo. 2004), *petition for cert. filed*, May 12, 2006 (No. 05-11122); *Blanton v. State*, 880 So.2d 798, 802 (Fla. 2004); *People v. Shepherd*, 689 N.W.2d 721, 672 (Mich. 2004); *State v. Bell*, 603 S.E.2d 93, 116 (N.C. 2004); *State v. Johnson*, 98 P.3d 998, 1006-012 (N.M. 2004); *Wall v. State*, 184 S.W.3d 730, 745-47 (Tex. Crim. App. 2006); *Lee v. State*, 143 S.W.3d 565, 571 (Tex. App.—Dallas 2004, pet. ref'd). Also, after determining that *Crawford* should be given retroactive application, the Ninth Circuit employed a harm analysis. *See Bockting I*, 399 F.3d, at 1022.

A rule subject to harmless-error analysis necessarily does not implicate principles of fundamental fairness such that courts should apply it retroactively under *Teague*. Indeed, even errors that are considered structural and therefore require mandatory reversal without a harm analysis are not automatically applied retroactively. *See Tyler v. Cain*, 533 U.S. 656, 666-67 (2001) ("The standard for determining whether error is structural . . . is not coextensive with the second *Teague* exception, and a holding that a particular error is structural error does not logically dictate the conclusion that the second *Teague* exception has been met." (citations omitted)). The other five instances – apart from *Gideon* – in which the Court has recognized a structural error requiring automatic reversal have *not* been found to be watershed rules. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). If even a rule considered to be so fundamental that it requires mandatory reversal is not automatically a watershed rule, then a decision, such as *Crawford,* that is subject to harm analysis is all the less appropriate for retroactive application.

C. The Practical Impact of Applying *Crawford* Retroactively Should Inform the *Teague* Analysis.

The Court should not assess *Crawford*'s retroactivity under *Teague* in a vacuum. "'The relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purpose for which the writ of habeas corpus is made available.'" *Teague*, 489 U.S., at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). Federal habeas review should not upset the finality of state convictions that were valid when entered on the basis of subsequent, gradual developments in

the law over which reasonable jurists may disagree. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). Thus, the *Teague* analysis contemplates not only considerations regarding the substance of the rule, but also the effects on state criminal proceedings if the rule is retroactively applied.

Indeed, even before *Teague*, the Court recognized and respected these strong state interests when evaluating the retroactive implementation of criminal procedure rules:

> "The retroactive application of *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] would have a disruptive effect on the administration of justice. We can only guess at the number of cases where *Edwards* might make a difference in the admissibility of statements made to the police, but the number is surely significant. In all of those, some inquiry would be required to assess the substantiality of any *Edwards* claim. That investigation, and the possible retrial, would be hampered by problems of lost evidence, faulty memory, and missing witnesses." *Solem*, 465 U.S., at 650 (citing *Jenkins v. Delaware*, 395 U.S. 213, 220-220 (1969)).

These concerns apply equally in this case, and so the Court's determination should likewise account for the States' interest in the finality of their criminal convictions. *See Sawyer*, 497 U.S., at 242-43 ("The costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.") (quoting *Solem*, 465 U.S., at 654)). These interests strongly weigh against *Crawford*'s retroactive application.

1. Applying *Crawford* Retroactively Would Significantly Disrupt the States' Ability to Administer Justice.

Retroactive application of *Crawford* could imperil countless criminal convictions entered under the prior *Roberts* standard. As Chief Justice Rehnquist observed, "thousands of federal prosecutors and . . . tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists, is covered by the [*Crawford* majority's] new rule. They need them now, not months or years from now." 541 U.S., at 75 (Rehnquist, C.J., concurring in judgment) (citations omitted). And even that estimate presumed that *Crawford* would apply only prospectively. *Id.*

The sheer volume of judicial citations to *Crawford* attests to the magnitude of the potential fallout if its holding applies retroactively. *See* Robert William Best, *To Be Or Not To Be Testimonial?*, 2005 ARMY LAWYER 65, 87 (2005) (noting that "[e]very week, at least twenty opinions are released that make a citation to *Crawford*"). As of July 7, 2006, nearly 1,900 reported court decisions had cited *Crawford*. The citing courts represented all fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, the First through Eleventh Circuits, the District of Columbia Circuit, and federal district courts within all of those circuits.

The vast majority of these cases have raised the *Crawford* issue on direct appeal – only about 200 cases have addressed the issue on state or federal habeas review. But, if the Court holds that *Crawford* applies retroactively, the ratio between *Crawford* claims on direct review and those on habeas review could well be reversed. The resulting litigation would be staggering, straining the capacity of the state and federal courts.

2. Because the scope of the testimonial-evidence requirement remains unclear, criminal defendants would be all the more encouraged to seek habeas relief.

Crawford declined to provide "a comprehensive definition of 'testimonial,'" evidence. 541 U.S., at 75; *see also id.*, at 6 (Rehnquist, C.J., concurring in judgment) (arguing that *Crawford*'s test "casts a mantle of uncertainty over future criminal trials in both federal and state courts"). And *Davis* confirmed that whether evidence qualifies as testimonial will be a fact-specific inquiry. *See Davis*, 126 S. Ct., at 2270, 2273-74. Consequently, the federal courts will have to define *Crawford*'s scope experientially, developing its parameters over time on a case-by-case basis. In the interim, if *Crawford* applies retroactively, habeas counsel can be expected to make every effort to expand *Crawford*'s evolving definition of "testimonial evidence," thus further multiplying the number of habeas challenges to long-settled convictions.

The expected proliferation of habeas challenges springing from the still-evolving *Crawford* test not only would burden state prosecutors, but also would raise serious jurisprudential concerns. If federal courts decide *Crawford*'s scope principally in cases on collateral review, they will be developing the contours of a new test – one about which reasonable jurists by definition could disagree – based on records established in cases that were unquestionably constitutional when they became final. To do so would "seriously undermine[] the principle of finality which is essential to the operation of our criminal justice system." *Sawyer*, 497 U.S., at 242 (citing *Teague*, 489 U.S., at 309).

3. Any resulting retrials based on *Crawford* would be hampered by problems of lost evidence, faulty memory, and missing witnesses.

Finally, as in any case on collateral review, remand for a new trial on *Crawford* grounds would entail a new proceeding using old evidence, which may have deteriorated, become lost, or been destroyed. When a habeas petitioner obtains a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986)) (internal citations omitted). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring).

These problems would only be exacerbated in a new trial predicated on the retroactive application of *Crawford*. Because a *Crawford* remand would be made specifically for the purpose of having a witness testify about a fact that was otherwise proved at trial, it would necessarily require fresh testimony of witnesses regarding incidents long-past. Any such trial would be subject to the fading of memory and the loss of key witnesses. Ironically, then, the results of these proceedings could be considerably less reliable than the original trials conducted under the *Roberts* standard. The States' substantial interest in avoiding widespread uncertainty weighs heavily against *Crawford*'s retroactivity.

II. The Court of Appeals Erred in Granting Habeas Relief Based on a Constitutional Right Not Clearly Established at the Time the State Court Adjudicated Bockting's Sixth Amendment Claim.

Even if the Court concludes that *Crawford* falls within *Teague*'s exception for "watershed rules," it should still reverse the court of appeals's judgment granting habeas relief. Congress has adopted a comprehensive statutory scheme governing federal habeas proceedings, the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§2241-2266 (AEDPA). Bockting's petition is governed by §2254(d)(1) of the AEDPA, which by its terms does not incorporate the *Teague* exceptions. Rather, this provision conditions habeas relief on a showing that the petitioner's conviction was contrary to or an unreasonable application of "clearly established" precedent from this Court, and it is beyond dispute that the *Crawford* rule was not clearly established at the time the state court adjudicated Bockting's Sixth Amendment claim.

A. Section 2254(d)(1)'s "Clearly Established Federal Law" Restriction Does Not Incorporate the *Teague* Exceptions.

Under §2254(d)(1) of the AEDPA, habeas relief is conditioned on a showing that the state court merits adjudication was contrary to or an unreasonable application of "clearly established" Supreme Court precedent. The statute provides no exception to the "clearly established" requirement. The court of appeals, however, interpreted §2254(d)(1) as incorporating the *Teague* exceptions. Under the court's ruling, the phrase "clearly established" law includes new rules of constitutional law – rules not dictated by precedent – if these new rules fall within a *Teague* exception. As a result, some habeas petitioners will be able to circumvent §2254(d)(1)'s "clearly established" requirement. This interpretation of the statute is incorrect.

In determining whether the *Teague* exceptions are incorporated into §2254(d)(1), the "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (quotations omitted).

The Court has recognized that the inquiries under §2254(d)(1) and *Teague* are "distinct." *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam). Some similarity exists because, with the exception of the source of controlling precedent, whatever would qualify as an "old rule" under *Teague* will constitute "clearly established" federal law under §2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 412 (2000). But otherwise, the "clearly established law" and *Teague* determinations are very different. For example, the two differ with respect to the timing at which the legal landscape is considered. Under §2254(d)(1), the federal court reviews only controlling precedents existing at the time the state court adjudicated the claim. *Teague*, on the other hand, focuses on precedents as of the date the defendant's conviction and sentence became final on direct review. "In this respect, the 'clearly established Federal law' phrase bears only a slight connection to [the Court's] *Teague* jurisprudence." *Williams*, 529 U.S., at 412. The two also differ in that §2254(d)(1) restricts the source of clearly established law to the Court's precedent. *Id.*

These differences extend to the *Teague* exceptions. A plain reading of §2254(d)(1) establishes that the *Teague* exceptions are not incorporated into that statute. Section 2254(d)(1) bars habeas relief when the federal law governing the prisoner's claim was not "clearly established" by the Court's precedent when the state court adjudicated the claim on the merits. Whereas the *Teague* doctrine

provides two exceptions to its bar against the application of new rules, the text of §2254(d)(1) does not: if the law was not "clearly established" – the rule was not dictated by precedent – §2254(d)(1) precludes habeas relief. And "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters Ins. Co. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted).

A comparison of the text of §2254(d)(1) with the language of other AEDPA provisions confirms that Congress did not intend to include exceptions to the "clearly established" limitation. In other AEDPA provisions where Congress sought to incorporate *Teague* retroactivity principles (along with the *Teague* exception), it did so explicitly in the text of the statute. For example, §2244(b)(2)(A) states that a second petition is permitted where "the applicant shows that the claim relies on a *new rule* of constitutional law, *made retroactive* to cases on collateral review by the Supreme Court . . . ." 28 U.S.C. §2244(b)(2)(A) (emphasis added); *see also* 28 U.S.C. §2255 ¶7,(1) (comparable provision for federal prisoners). Likewise, Section 2244(d)(1)(C) provides that, with respect to a right that "has been *newly recognized* by the Supreme Court and *made retroactively applicable* to cases on collateral review," the one-year limitations period for state prisoners begins to run on the date the Court initially recognized that right. 28 U.S.C. §2244(d)(1)(C) (emphasis added); *see also* 28 U.S.C. §2255 ¶6,(3) (comparable provision for federal prisoners). And, under §2254(e)(2)(A)(i), when the prisoner fails to develop the factual basis of his claim in state court, a federal evidentiary hearing is nevertheless permitted if, among other things, the claim relies on "a *new rule* of constitutional law, *made retroactive to cases* on collateral review by the Supreme Court. . . ." 28 U.S.C. §2254(e)(2)(A)(i) (emphasis added). Finally, under §2264(a)(2), a federal court may consider a claim not raised and decided on the

merits in state court if the failure to raise the claim properly was "the result of the Supreme Court's recognition of a *new Federal right* that is *made retroactively applicable*." 28 U.S.C. §2264(a)(2) (emphasis added). Each of these statutory provisions explicitly accommodates new rules that would apply retroactively under *Teague*.

By contrast, §2254(d)(1) does not permit consideration of a "new rule," regardless of whether the rule is judicially subject to retroactive application on collateral review. The statute limits the scope of controlling law to clearly established Supreme Court precedent – that is, precedent that would constitute an "old rule" under *Teague*. If Congress had intended for federal courts to consider new rules subject to retroactive application in making the §2254(d)(1) determination, it would have used phrases like "new rule of constitutional law" and "made retroactive to cases on collateral review," as it did elsewhere in the AEDPA. But it did not. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Walker*, 533 U.S., at 172 (comparison of Section 2244(d)(2) to other AEDPA provisions supplies "strong evidence" that, had Congress intended to allow tolling of the one-year limitations period during pendency of federal collateral review, it would have expressly mentioned federal review).

The Ninth Circuit offered three justifications for incorporating the *Teague* exceptions into §2254(d)(1). First, the court claimed that, in directing lower courts to undertake both inquiries in an AEDPA case, the Court "impliedly endorsed the application of *Teague* in the AEDPA context." Pet. App. C at 35a (citing *Horn*, 536 U.S., at 272). But in *Horn*, the Court stated that "if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct." 536 U.S., at 272; *see also Williams*, 529 U.S., at 412 (noting that in

one respect, "the 'clearly established Federal law' phrase bears only a slight connection to our *Teague* jurisprudence.")

Second, the Ninth Circuit asserted that the language of §2254(e)(2)(A)(i) showed "Congress intended to preserve the *Teague* exceptions because AEDPA explicitly provides for their application in proceedings involving state habeas petitions." Pet. App. C at 35a. This conclusion does not follow. Section 2254(e)(2)(A)(i) has nothing to do with state habeas petitions; it concerns the appropriateness of federal evidentiary proceedings. The court may have presumed that, because Congress included *Teague* retroactivity principles in §2254(e)(2)(A)(i), Congress must have intended to incorporate them into §2254(d)(1). But the correct presumption is just the opposite. Section 2254(e)(2)(A)(i) provides for an evidentiary hearing where the claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." Section 2254(d)(1), on the other hand, narrows the types of available claims to those premised on "clearly established" federal law, as determined by the Court. While the former explicitly embraces new rules and retroactivity principles, the latter does not.[11]

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11. Alternatively, the court of appeals may have deduced that, as one commentator has argued, if §2254(e)(2)(A)(i) "is to have any meaning, . . . then the *Teague* exceptions must still exist." Sharad Sushil Khandelwal, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 459 n.45 (1997). But this argument is also wrong. Section 2254(d)(1) does not apply when the state court did not decide the claim on the merits. And §2254(e)(2)(A)(i) authorizes federal evidentiary hearings regardless of whether the state court adjudicated the federal claim on the merits. Thus, even if §2254(d)(1) does not incorporate the *Teague* exceptions, there are clearly some circumstances when §2254(e)(2)(A)(i) would operate meaningfully – such as when the state court denied the claim on procedural grounds. But more importantly, under §2254(e)(2)(A)(i), an

Finally, the Ninth Circuit concluded that "the constitutional doubt canon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process." Pet. App. C at 35a. But this canon has two important prerequisites. First, the "statute must be genuinely susceptible to two constructions," a determination that is made "after, and not before, [the statute's] complexities are unraveled." *Almendarez-Torres v. United States*, 523 U.S. 244, 238 (1998). And second, the constitutional question must be one that leads the court to have grave doubt about the statute's constitutionality. *Id.*, at 239.

Section 2254(d)(1) is not genuinely susceptible to two constructions. As demonstrated, §2254(d)(1) provides that if the law was not "clearly established" – that is, the rule was not dictated by precedent – habeas relief is foreclosed. The statutory text contains no exception for new rules that apply retroactively. Additionally, other AEDPA provisions enacted at the same time as §2254(d)(1) demonstrate that when Congress intended to incorporate new rule and retroactivity principles, it knew how to do so.

Nor does the absence of retroactivity exceptions in §2254(d)(1) create grave doubt about the statute's constitutionality. As the Court recognized in *Felker v. Turpin*, 518 U.S. 651 (1996), "the power to award the writ by any of the courts of the United States, must be written by law" and "judgments about the proper scope of the writ are normally for Congress to make." *Id.*, at 664 (quotations omitted). Section 2254(d)(1) does nothing more than regulate the relief prisoners may obtain in federal habeas, and "Congress has

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evidentiary hearing is permitted only when the Court has held that the new rule of constitutional law applies retroactively to cases on collateral review. When this occurs, the same new rule that authorizes an evidentiary hearing under §2254(e)(2)(A)(i) will constitute clearly established precedent for purposes of §2254(d)(1).

ample power to adjust the circumstances under which the remedy of the writ of habeas corpus is employed." *Lindh v. Murphy*, 96 F.3d 856, 872 (CA7 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (plurality opinion) ("[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . prescribe remedies. . . ."). [12] And the court's continuing ability to consider original writs for habeas corpus eliminates any constitutional doubt. *Felker*, 518 U.S., at 664.

B. *Crawford* Was Not "Clearly Established" Federal Precedent When the Nevada Supreme Court Adjudicated Bockting's Claim on the Merits.

The Nevada Supreme Court decided Bockting's Sixth Amendment claim on the merits in 1993. At that time, *Roberts* – not *Crawford* – was controlling Confrontation Clause precedent. Therefore, unless Bockting can show that the state court's merits adjudication was contrary to or an unreasonable application of *Roberts*, §2254(d)(1) forecloses his application for habeas relief.

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12. In numerous contexts the Court has recognized that habeas relief may not be available even when the underlying constitutional claim is meritorious. *See, e.g., United States v. Leon*, 468 U.S. 897 (1984) (rejecting habeas claim based on good faith exception to Fourth Amendment exclusionary rule); *Nix v. Williams*, 467 U.S. 431 (1984) (same for independent discovery doctrine); *Stone v. Powell*, 428 U.S. 465 (1976) (holding that Fourth Amendment claims capable of full and fair litigation in state court are not generally cognizable in federal habeas review).

C. The Court Should Decide the Important Issue of Whether §2254(d)(1) Incorporates the *Teague* Exceptions.

The Court should resolve whether §2254(d)(1) of the AEDPA incorporates the *Teague* exceptions, for several reasons. *See* Pet. at i (Questions Presented III). First, resolution of this issue is needed to settle a conflict among the federal circuits and thereby ensure consistent application of §2254(d)(1). The Ninth Circuit explicitly read §2254(d)(1) "to incorporate the *Teague* exceptions. . . ." Pet. App. C at 35a. And the Third, Fifth, and Eighth Circuits have uncritically incorporated the *Teague* exceptions into their §2254(d)(1) determinations.[13] Conversely, the Fourth and Seventh Circuits have expressed the view that the *Teague* exceptions play no part in the §2254(d)(1) analysis.[14] The Second Circuit has recognized the existence of this debate, but has not yet resolved the issue.[15] Because the success of a habeas petition should not hinge on which circuit a State falls within, the Court should settle this dispute.

Second, §2254(d)(1) is an important federal statute affecting s multitude of cases. The AEDPA altered the landscape for state

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13. *See, e.g.*, *Lewis v. Johnson*, 359 F.3d 646, 653-54 (CA3 2004); *Cockerham v. Cain*, 283 F.3d 657, 660-61 (CA5 2002); *Williams v. Cain*, 229 F.3d 468, 474-75 (CA5 2000); *Evans*, 371 F.3d at 444-45.

14. *Ramdass v. Angelone*, 187 F.3d 396, 406 n.4 (CA4 1999) ("§2254(d)(1) can be seen as stricter [than *Teague*] in that it does not recognize *Teague*'s two traditional exceptions. . . ."), *aff'd*, 530 U.S. 156 (2000); *Gosier v. Welborn*, 175 F.3d 504, 510 (CA7 1999) (noting that §2254(d)(1) "closes the escape hatches in *Teague*. . . ."); *but cf. Bintz v. Bertrand*, 403 F.3d 859, 864-867 (CA7 2005) (considering *Teague* exceptions in §2254(d)(1) context).

15. *Mungo v. Duncan*, 393 F.3d 327, 334-35 (CA2 2004).

prisoners challenging their criminal convictions, and, at the center of that legislation lies §2254(d)(1), which provides the standard by which state court merits decisions are reviewed in federal habeas proceedings. As explained above, the court of appeals interpreted §2254(d)(1) in a manner inconsistent with the language of the statute and the purposes underlying the AEDPA's enactment. There is a pressing need for the Court's guidance on the correct application of this important statute. *Cf. Williams*, 529 U.S., at 362 (providing broad guidance on the proper interpretation of various aspects of §2254(d)(1)).

And finally, if the Court does not resolve this question, the court of appeals's holding that §2254(d)(1) incorporates the *Teague* exceptions may remain precedential authority, even if the decision is reversed on other grounds. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2. (CA9 1991). Thus, the Court's resolution of the issue is especially important to the nine States located in the Ninth Circuit.

For these reasons, the *amici* States urge the Court to reach the third question presented and hold that §2254(d)(1) of the AEDPA does not incorporate the *Teague* exceptions.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

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